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SOME RECENT SUPREME COURT DECISIONS RELATING TO NEGOTIABLE INSTRUMENTS

By ROSCOE T. STEFFEN*

My principal difficulty this morning has been with regard to my subject, which is, as the Chairman has stated, that of Negotiable Instruments. My trouble is with the convention that what you have to say usually must have something to do with the subject which you have selected. And it seems I would like to talk on a number of matters which perhaps you will think are unrelated to negotiable instruments. Whether I can make a plausible bridge from negotiable instruments to those matters is a question. At all events I crave your indulgence.

By way of special pleading I would point out to you that, as the Chairman states, I have been at Indiana University for the last two or three weeks, and the weather down there, while still merely warm, has none the less reached as high as 108 degrees already. It is very difficult to be entirely logical and coherent at that temperature. Or at least I find it so.

What I would like to talk about in addition to negotiable instruments—if you determine it is in addition—would be certain of the recent Supreme Court decisions. I think I can

* Address by Roscoe T. Steffen, Professor of Law at Yale University School of Law, delivered before the Indiana State Bar Association at Lake Wawasee July 11, 1936.

show a connection between negotiable instruments and the recent Supreme Court decisions,—all without talking politics. Then I would like also, in the time that I have available, to say something concerning Mr. Chafee's talk of last evening relative to legal method and the different approaches to law now current.

I am more or less forced to take up this last matter for the reason that the men whom Mr. Chafee criticized—or at least queried—have all been connected in one way or another with the Yale Law School, from which place I come. Mr. Llewellyn was a classmate of mine. Walter Wheeler Cook was a professor of mine at the Yale Law School, and Jerome Frank was there for a short period as a research associate. Now, do not be misled, do not understand that I am going to defend each of these three men. Nor, on the other hand, do not expect that I am going to defend Mr. Chafee. I will take still a different position.

I have been in the negotiable instruments field since I graduated in 1920 from the Yale Law School. After graduation I went to New York for a matter of about four years, and was associated with counsel for the National City Bank of New York. If you have any doubts as to what bank the National City Bank is, you may remember one Charles E. Mitchell. He was President of the bank at that time. You may recall also that, in the late summer of 1929, he made a statement to the effect that we had reached a new economic era and that his bank would loan all the money that anybody wanted on the security of stocks and bonds. He led the individualists in resisting all efforts on the part of the Federal Reserve to put such brake as it could upon ruthless speculation. But perhaps I should not talk about Charles E. Mitchell, for it has been said that he knew very little about banking, much less about negotiable instruments which is my subject this morning.

It is surprising, in view of their age and respectability, that there is anything left to say about negotiable instruments. If you go back to Lord Mansfield—I can not go back to the time of King James, as the gentleman did just now—but if

you go back to Lord Mansfield and the seventeen hundreds, you find a great contribution being made to the law of negotiable instruments. Almost it is fair to say that the law was written then. Many points which were settled at that time have continued to be settled, a tribute to the genius of a great judge. Nor was there any humbug about the law having always existed; it was frankly fashioned to order to suit Mansfield's economic sense. The philosophy underlying this development was perhaps as well brought out by Mansfield himself as by anyone when he said in 1777 that: "I desire nothing so much as that all questions of mercantile law should be fully settled and ascertained;" and, as he phrased it, "it is of much more consequence that they should be so, than which way the decision is."

But strangely, there have been many developments and much uncertainty since 1777. With much of this you are quite familiar. The law in the different states had become so diverse, in fact, that in 1892, under the leadership of the American Bar Association, it was decided to formulate a uniform statute. It is an interesting commentary that in spite of the prestige of the statute it took from 1892 to 1924, when Georgia adopted the act, before we finally had a uniform statute. That is, before we got what on paper looked to be a uniform statute. I will have more to say with respect to that later. All I want to point out now is that in spite of that codification and its supposed crystallizing effect, there are still a great many problems which are by no means certain of solution. The law of negotiable instruments has been growing as has other law.

Now, let us consider just a few of the different questions which have come up recently. Some of these grow out of difficulties in the statute, but many I think can best be said to grow out of a changing economic order. Last year, in December, the United States Supreme Court had a case before it involving a purchase of bonds. It seems that a brokerage house in Chicago bought certain bonds from a customer without first consulting its records of lost and stolen instruments. In fact it had on file a notice from the loser that the particu-

lar bonds had been stolen and giving the numbers of each. The Court then was faced with the problem of, let us say, negotiability in the broad sense. How far should government go in this situation to protect the bona fide purchaser?

What were the precedents? In the early case of *Miller v. Race*, Lord Mansfield had said that it is desirable that the bona fide purchaser of stolen bank notes should be protected. Perhaps I should make some comments on the philosophy of that idea. Lord Mansfield seemed to have no doubts of the desirability of his position. He did not see much point in going out, moreover, to determine whether his rules worked in practice, as Mr. Llewellyn suggests doing; he assumed that they would. Nor did he have any idea that he was ruled by a father-complex, as Jerome Frank seems to be. But for the last two hundred years we have seen bonds and bank notes—note that the case started with bank notes and immediately spread to ordinary commercial instruments—and later to bonds—being taken away from the holder, whether a widow, an orphan, a blind person or some other, and have said simply that it is desirable that the bona fide purchaser should be protected.

So, here was a bond case before the United States Supreme Court. The court had all sorts of principles to draw from to reach a conclusion; the law of Agency is fertile with suggestions as to when notice should be imparted to a principal. There was precedent, moreover, in Illinois to the effect that the broker should at his peril take cognizance of the bond numbers in his files. But there have been precedents to the other effect. In short, as is usually the case, the decision turned not so much on an unfolding legal principle—as Mr. Chafee seemed to suggest last evening—or upon precedent, as upon a choice between conflicting principles and precedents. The court decided for the broker, unless it could be shown that the information was actually in the mind of the particular employee who bought the bonds on the day of purchase.

The result of this case is, of course, to upset a reasonable effort to protect owners of bonds. Now, what I want to say is that the decision turned simply on a question of philosophy,

or politics if you prefer: How far do you want to go to protect one or another element in society? This court said it is more desirable—you might expect that this court would say it—that business carry on without interruption, that the bona fide purchaser be protected, than that we should put him to the inconvenience of determining whether or not he had information in his files which would have disclosed that these particular bonds were stolen.

Let us take another illustration. In a case decided about two years ago, the United States Supreme Court had before it a question involving which law was to be applied in the case of a note drawn and payable in Florida, but which was being sued upon in Pennsylvania. The Pennsylvania and the Florida courts had disagreed as to the effect under the N. I. L. of the particular form of interest provision contained in the note. The question then was, which decision should the United States Supreme Court choose as the one which it should follow, or should it do, as the Court did about a century ago in the great case of *Swift v. Tyson*, say that it was free in the interest of building a strong national policy—that is in the interest of a uniform law—to take whichever view it preferred.

The court decided that the law of the place of payment should control. It next decided, and I think ill-advisedly, that in order to determine what that law is the decision of the highest court in the state on the point should control—even though to do so would be to ignore what might be the prevailing rule throughout the country with respect to that particular question. And, of course, such a view ignores completely the effort on the part of the several states to reach by constitutional means a measure of national uniformity in a purely commercial matter. Again the decision was not dictated by any single paramount legal principle—unless States Rights has come to be such—but lay entirely in the realm of choice.

I want to get two or three other illustrations before you before attempting any generalizations. Let us take next the position today of the certified check. Here also have been a number of very much debated questions. Six or seven,

possibly ten years ago, a man named Manning came into Barnett Brothers in Chicago and wanted to buy a diamond. By way of payment he tendered a draft drawn by a St. Louis bank on a Chicago bank to the order of Manning. Barnett Brothers decided that before they would hand Manning the diamond they would go to the Chicago bank and get the draft certified, which was done. It turned out, however, that Manning had altered the instrument. He had erased the name of the payee and put in his own name instead. Of course, the drawee bank was unable to charge the drawer's account, because it had not made payment to the real owner of the paper. Therefore it re-credited the drawer, and the question then came to an issue as to whether the bank which cashed the check, acting for Barnett Brothers, or the bank which had certified and paid the check should take the loss, a matter of about \$600.

Here again you come to the statute in the search for an answer. But unfortunately the statute is not precise to the point. Section 62 says that the acceptor agrees to pay according to the tenor of his acceptance, but what the tenor of his acceptance is, is a debatable matter. You may say in accordance with earlier precedent that the tenor of his acceptance was according to the tenor of the drawing, or you may say that the tenor of his acceptance is according to the tenor of the instrument as presented. With the statute ambiguous the court decided that the acceptance or certification should be read according to the tenor of the draft as presented; in other words, the court put the loss on the drawee bank. A few years later, the California court had the same case presented, and it decided the point in the same way.

Now, as a matter of philosophy, why should the court decide to take a new position here? Are there any guides to aid a court in reaching its decision, or to aid the lawyer in determining what it will do?

I am sure Mr. Llewellyn offers no solution. You cannot go and see what has been done in order to determine what should be done, that is if you are deciding a new case. I see nothing in Mr. Jerome Frank's father-complex suggestion

that could have operated to influence the Illinois Court in determining the result to be reached in the case before it. I doubt if there is anything on principle, as Mr. Chaffee would have it, which governed or forced the result. Mr. Walter Wheeler Cook's insistence that principles hunt in pairs—if not in packs—has deprived the argument on principle of most of its supposed power to forecast inevitable results.

Possibly I should make clear right now my philosophy as regards this matter. This case is a good illustration. It seems to me that the court like any other governing body was faced with the opportunity here of making law; that it functioned just as a legislature does; it had an opportunity of saying just what a certified check should look like. It decided that it would make the certified check as nearly like money as possible. That, in my view, was good legislation. I doubt if it was controlled by any prior principle. I doubt if most of the law which has been built up by courts, piece by piece, has been so much a matter of looking back to principles as they perhaps would have you believe. At times courts build new principles. Before I finish I want to make some suggestions as to what should guide them in building those new principles.

It is interesting in this case to go further and consider what the bankers did. Well, the bankers, finding that they were going to be obligated on certified checks in situations where they could not charge the drawer, immediately either waived their liability by stipulation or decided that they would not certify checks any longer for the holder. Through one means or another, therefore, they have practically wrecked the old practice of certifying checks. I, having on the one hand said that I think this was good legislation on the part of the court, have to admit that on the other it did not work. The difficulty—and I shall speak more of this later—may lie in the fact that the controlling vote was left with the banker. Bankers like other people are actuated mainly by self-interest and are often short-sighted.

Now, if I may leave the certified check case for a moment, I should like to mention another situation with respect to

bonds which has caused trouble. The N. I. L. was drafted in the midst of the 1893 depression. At that time, there was very little mention or thought of the present day long form bond. There are some indications, Section 65 being one, that the bond was intended to be controlled by the N. I. L. Most of the decisions since the act was adopted have so held. But the result is that we are now in a situation where we can not square the modern long form bond with the dictum of Chief Justice Gibson, which was largely incorporated in the N. I. L., that a negotiable instrument is a courier without luggage. The early idea that negotiable instruments function as a substitute for money no longer fits the case. As a result we have had a series of awkward decisions trying to bring the long form bond, and its many conditions and stipulations, within the strict requirements of the N. I. L. The drive for negotiability has long since burst the bounds of the early substitute for money rationalization.

I think possibly the only way out of this difficulty is either to amend the N. I. L. or to go much further and draft a new uniform investment instruments act. I should like to see such an act prepared. As it seems to me it should frankly say that an instrument may be conditional and still be negotiable. Its value as a long term investment may well be enhanced by such provisions rather than the converse, and, it must be remembered, we have gone much further with share certificates, with respect to warehouse receipts and with bills of lading, all of which have been made negotiable, though in no sense substitutes for money.

I would like to point out, also, if we were to draft such a statute, that Mr. Chaffee has done excellent groundwork in discussing the overdue instrument. His point is, briefly, that equities of ownership should not affect the transfer of a defaulted or overdue bond. This means that a person should be enabled to dispose of bonds in such case just as freely as though they were still negotiable; that is, as respects the equities of ownership, equities of defense arising upon the issuance of such paper would still be available. Probably both matters of defense, inasmuch as they are very few today

in the case of bonds, as well as equities of ownership, should be cut off by negotiation, making the overdue bond fully negotiable.

There are a number of other points which should be covered by such a statute. I suggest the matter to you as one requiring study. It has already been brought before the commissioners on uniform state laws and they have reported, but not yet acted on it. Perhaps I should discuss briefly the case of the registered bond, since it requires especial attention. The trouble with the registered bond is that it is not payable to order or bearer, as required under the N. I. L., but to the registered holder. Therefore, it is not negotiable, though, of course share certificates drawn in similar fashion have easily been made negotiable.

The practical result is that we have either bearer bonds on the one hand or registered bonds on the other,—registered bonds selling at a discount of one to two dollars below that of the bearer instrument. The reason for this discount is said to be simply that registered paper is more difficult to transfer. But the further reason, that registered bonds are non-negotiable, so that you may not get what you think you have bought in the case of stolen bonds, certainly has an important bearing on the matter. At all events practically all bonds are issued today in bearer form. While it was important in Lord Mansfield's day to have bearer paper to act as currency, there is no reason today for making a bond, which is a long term investment instrument, in bearer form. Leave it open to a person to deal in bonds payable to bearer, if he sees fit, but at the same time develop the order instrument.

Of course, you can see that as far as bankers are concerned, they are not particularly interested in having a negotiable order instrument. If they take bonds as collateral, they prefer to take them in bearer form. They are surer then that they are holders in due course or bona fide purchasers. From the standpoint of the issuing corporation, when it pays its bonds, it is surer to pay to a holder, rather than to a person who may hold under a forged endorsement. The general

public who have invested their funds in bonds have nothing to say, but they take losses running to millions of dollars annually. All you have to do is note the bank and mail robberies and the great amount of money tied up in stolen bonds to appreciate the seriousness of the case. The Supreme Court decision saying that brokerage houses are not to be charged with loss notices in their files contributes materially to make the racket a success.

It seems to me that here again somebody has to take hold of the matter, whether court or legislature, and force a new procedure. Quite obviously the thing can not be left to the self-interested groups now in control. But, now let me refer to one other matter, and I will have laid before you enough controversy relative to negotiable paper; enough, that is, for one morning. This has to do with the collection of negotiable paper, which has come to be a matter almost as important as the making of paper negotiable was to start with.

In 1924, the United States Supreme Court in the Malloy case held that where a collecting bank forwards paper to the drawee and receives a remittance in the form of a draft, it takes the risk that the draft may not be collectible. This was blind application of an agency principle established some 200 years before in the case of individuals. But the point was of great interest to bankers, for the situation where a remitting bank's draft goes unpaid owing to bank failure was to come up thousands of times in the next few years. In fact, in the 12 years preceding March 4, 1933, (no political significance intended as to that date) there were some 11,000 banks which failed and about \$5,500,000,000 lost or tied up in deposits throughout the country.

It is interesting today to read the American Banker's Association Journal as of the time when the Malloy case was decided. Also let me say to read most of the Law Review comments on the decision. You will find that the general counsel for the American Bankers' Association, and various bankers of prominence, said that the United States Supreme Court decision was "archaic," not exactly "horse and buggy"

law perhaps, but archaic, impractical, improper and unworkable. Banking simply could not be conducted on the basis of the Malloy decision; the customer should be made to take the loss, not the bank. Incidentally, I might point out that this was the same Supreme Court which decided the A. A. A. case, though it has become no longer fashionable to criticize it.

The Douglas case was decided two or three years later. The Court there ruled that the initial bank should be deemed to have purchased collection paper for which credit is given and, therefore, would become responsible on that theory for collection losses. With that decision the bankers proceeded to draft what they called a uniform statute, and in that statute they proceeded to provide that they would not be responsible for losses, that they would be agents merely, that they could forward paper any way they saw fit, and that they could receive remittance by draft, all without responsibility. They traded on the good name of the Commissioners on Uniform State Laws by naming their act a uniform statute. In New York and some other states they even had it adopted as an amendment to the Uniform Negotiable Instruments Law.

Bankers were riding on the crest of the wave at that time, 1928. The statute was adopted in Indiana in 1929. It was adopted by 9 states in 1929, and by 9 more in 1931. The net result of the statute was to put the entire loss, not on the bankers, not necessarily on the depositors, but the whole loss was in practical effect shifted to the debtor or drawer, the one man of all the parties involved who was probably least able to bear the loss. The insurance companies and the large corporations on whom the loss would seem to be shifted by the bankers, immediately stated on their receipts that checks were received conditionally, and that they would not deem them payment until they got the proceeds in liquid and final form. Obviously, that pushed the whole loss clear back to the drawer or debtor on the item.

In December last year the statute came up in Illinois and was held unconstitutional. In the preceding year the United States Supreme Court had held it unconstitutional as applied

to national banks. The theory of the statute, as regards protection given to the forwarder, was that collection proceeds in the hands of a failed collecting bank should be deemed to constitute a trust fund. The statute in fact was so broadly drawn that "trust" claims could have been payable out of any assets of the failed bank, its building or other assets, perhaps acquired fifty years before the failure. All tracing requirements were eliminated. Obviously such a makeshift "trust" could not apply to national bank liquidations.

The result is a garbled and highly uncertain situation. Recently, in an article in the *Tulane Law Review*, I have suggested this as a solution for the problem: Why not extend the Federal Deposit Insurance Corporation Statute, which has to do with the guarantee of bank deposits, to include a guaranty of collection losses as well? As the present statute stands, it merely covers deposits up to \$5,000. If it could be extended further, to cover collection losses, you would have accomplished what the Bankers' Code tried to do, and have done it, I think, on a much sounder basis.

As I visualize the matter of check collections, here at least the idea of checks as constituting money, currency, has a sure footing. The check has very largely displaced ordinary currency in settling balances. To have the check subject to all of the hazards it has been subject to over the past few years is to make that form of currency compare with the bank note of the old wild-cat banking days. The ideal should be that upon deposit of a check with a bank for collection the depositor can treat the resulting credit as cash, subject only to charge back in the event that the drawer had no funds and his check was not paid. Matters having to do with the negligence or with the insolvency of collecting banks are inter-bank affairs, with which the depositor should have no concern. When this is recognized, we will have made a long step forward, I think, toward making the check a much more desirable form of instrument, or shall I say, a much sounder form of currency.

The bankers, however, do not like the Federal Deposit Insurance Corporation Statute, even though it more than any

other one thing has restored confidence today. Bankers, if you recall, are very much like lawyers, they have resisted practically every measure which has been suggested for their benefit. You will recall that lawyers have been a little reluctant to adopt changed rules of procedure. Doctors likewise have not liked to have other people step in and tell them what they should do. Apparently somebody has to, because if you leave it to the people most conversant with a matter, they ordinarily do nothing. They know the ropes, and from their viewpoint, everything is all right.

Well, I have made something of a picture, I think, to show that Lord Mansfield would still have a great deal to do, were he alive today. I could go on with a number of other illustrations indicating uncertainty. But let us look at the thing now from another angle. What we are trying to do with respect to negotiable paper, I take it, is to achieve a national economy. We are trying to make the law uniform throughout the 48 states. It is fair also to say that the N. I. L. is probably our best example of what can be done by individual state action to accomplish such a result. Yet, nearly forty years were occupied in getting the statute adopted by all 48 states. It has been subject, moreover, to amendment at the hands of anyone—witness the Bankers Collection Code—who has happened to have an axe to grind. And even though a paper uniformity has been achieved there has been a good deal of diversity in interpretation. The Supreme Court on its part has now abandoned any thought of lending its influence to promote uniformity of construction. All in all the result is nothing to be particularly proud of.

May I say also some words concerning the Commissioners on Uniform State Laws? I do not see that the Commissioners are as effective by any means now as they were in 1892 and '93, when first organized. It seems to me as if the body has become more of a political organization. It functions too much now as a nominating committee for the American Bar Association, which was not a part of the original plan at all. The work of the Commissioners must be re-vitalized if we are to proceed toward an effective national handling

of most of these problems, which, after all, are non-political, non-partisan, and of a sort which we are all agreed should be handled as a national affair.

Now, I would like to contrast this fumbling, with something of what has been attempted in the last few years by the Congress. There are a lot of other matters besides negotiable instruments which are to be looked at from a national viewpoint, or which some people at least think should be looked at in that way. We have had legislation relative to agriculture, relative to the conservation of our national resources, coal and oil, relative to the sale of negotiable securities, relative to labor and wage conditions. The effort has been again—and much more directly—to insure an efficient national administration of our present economy. These, too, have become involved in much litigation. So much, possibly, that the N.I.L. way of doing the thing is no worse than any other. Certainly I do not propose a constitutional amendment conferring upon Congress the exclusive power to legislate on negotiable instruments, though that would be the intelligent thing to do, as in the case of most of the matters just mentioned. Almost I agree with Lord Mansfield that it is of more consequence that the point be settled and ascertained, “than which way the decision is.”

On the other hand, I doubt whether or not the present Supreme Court, or the present majority thereof, has a very clear idea of the type of thing that I have been talking for here, that is, of the need for an efficient administration of matters which should be uniform or which should be handled on a national basis. Only a prodigal nation could afford the waste and loss caused by our efforts to reconcile differences—many of no consequence—growing out of the circumstance that we have 49 separate jurisdictions.

It is interesting to examine the attitude of the Supreme Court in the recent cases having to do with this legislation. They purport, as Mr. Chafee suggests the thing is done, to be applying legal principles. But the difficulty is that there are at least two sets of such principles, those the majority use and those adopted by the minority. The result is that

you must look elsewhere to find the basis for a decision. It has, of course, been long apparent to lawyers that in such case you have a government of men and not of laws, even though our political friends deny this is so. And the question is, have they legislated wisely? Possibly the question goes deeper, for has not the court by refusing to define its terms, as Lord Mansfield would have done, actually been arrogating more and more legislative power to itself?

The recent minimum wage case in which the Supreme Court held that Mr. Moorhead, who had violated the minimum wage law in New York, was not to be prosecuted, is a case in point. It was really a rather pitiful decision. Looked at from the standpoint of prior cases, or looked at from almost any angle, the court showed how far it can go toward substituting its economic judgment for that of the legislature. The New York Court of Appeals in making its decision purported to follow what the Supreme Court would probably have done. The Supreme Court refused to re-examine the grounds on which the Adkins case had been decided, notwithstanding there had been a long development in procedure since the Adkins case. It is a vicious circle.

The whole result seems to me to grow out of a lack of national viewpoint on the part of the majority of the present Supreme Court. That coupled with an emotional obsession with the notion that they must save the Constitution. I could make some comments with respect to the growth of the due process of law concept, but my friend, Mr. Hugh Willis (Professor of Law at Indiana University), has done a much better job in his book on Constitutional Law, published last December, than I could do this morning. It seems very evident, though, that the court in developing its notion of due process of law has advanced far from the original idea of what was due process of law, a matter having to do only with procedure. Where the court got its principles, where it got its law, lies concealed. It certainly is no part of the written Constitution.

May I say just a word in this connection as to how Mr. Justice Roberts construes the Constitution. It offers an inter-

esting contrast with how Mr. Chafee says decisions are made. In the A.A.A. case, you will recall, Mr. Justice Roberts said the thing to do is to put the Constitution down before you on the table on one side—probably to the right—and then the statute on the other. Next you read the two and determine whether the statute conforms. If it does, it is constitutional; if it does not, it is unconstitutional. He would make the process out to be really quite simple,—with the inference, of course, that the minority does not know how to read. There is no instructor in the United States who could hold his job and make such a naive suggestion.

Enough has been said, I take it, to demonstrate that this matter of handling national affairs through Congress, has run into substantially as much difficulty, owing to the present attitude of the Supreme Court, as we have run into working from the other side in attempting to develop a uniform law with respect to negotiable paper. Apparently there is no royal road to certainty.

Now, I said at the beginning that I would make some suggestions as to a philosophy or guide by which a court faced with a troublesome question in the negotiable instruments field might reach a decision. As usual, I assume it will have conflicting precedents and various principles before it. At times it is necessary to look beyond these. I want, therefore, to lay before you a picture of what has been happening, almost unobserved, in this negotiable instruments field.

We started out by making bills of exchange and notes negotiable. That was back in the seventeen hundreds. We have steadily added to that category warehouse receipts, bills of lading, share certificates. We have been steadily incorporating in the country a greater and greater number of corporations. More and more property is being held by corporations. Now, by reason of having made the share certificates negotiable, we have made the transfer of what formerly were fixed assets, an extremely mobile, flexible matter. Again we have developed and sold an enormous quantity of bonds, which are secured by mortgages on various properties. These bonds as I pointed out a few minutes ago,

are bearer in form for the most part. They can blow out of the window and be sold by the finder to a bona fide purchaser, who obtains absolute title. Again fixed assets of great value have been transmitted into a piece of paper transferable by delivery alone.

The result has been that enormous values, once fixed in character, have now become extremely liquid. They are easily manipulated. I have argued this morning that we should make registered bonds negotiable. I have suggested that the certified check should be made an instrument which would speak as of the date of certification. The point is that we have never sat down to find out why we want greater and greater negotiability. We have never analyzed whether perhaps we should not sooner or later reach a stopping point.

A determination of some of the small questions I have discussed, for example as to whether a brokerage house should have notice of loss from information in its files, ought to be checked against a determination of how our society should be built. Possibly, that was what the court did. Generally, however, courts have been too prone to follow precedent or principle without ever raising their eyes to see what was ahead of them. After all, what are we gaining by building up an ever more liquid form of security here which some people at the top can manipulate to their advantage? The farmer, who signed some papers when appointed as a lightning rod agent, finds that actually he signed a note, and that the local bank as holder in due course can require him to make payment. We have built up a money economy on the woes of, let us say, the poorer and less educated people. We do this self-righteously; unquestionably, it is better for business. I think I will close with the suggestion that we should reconsider the matter very carefully. Possibly it is time to call a halt to this sort of thing.

As to whether it is or not I have no answer. Perhaps it is like a number of other things, the present development with respect to monopolies for example. As far as I can see we are going to continue to develop more and larger corporations and the effort to go back to 1890, and the

Sherman Act, is merely wishful thinking. That is, the movement is going to go on. It has to be controlled somehow, but you can not turn the clock back.

Now as respects the study of law, do I make my point, which is: that it is not so much precedent, not so much principle—and not at all the father-complex—which controls the new case, but rather that it is a matter of choice. It is a recognition that law is not merely something foreordained that unwinds inevitably, just as the tree grows; that within limits you can make the law the way you want to; that the courts do make the law the way they want to. It behooves us therefore to see that that “want-to” should be a carefully examined “want-to-”, and representative of the highest aspirations of the time. This is much more than a mere matter of hunch or a blind following of principle.